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No. 10-1059

In the Supreme Court of the United States

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the Army Corps of Engineers violated the Water Resources Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 269, 385-397, amended by Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, by transferring or leasing to the State of South Dakota certain lands within the "external boundaries" of the Yankton Sioux Reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 606 F.3d 895. The opinions of the district court (Pet. App. 14-21, 22-31) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. A petition for rehearing was denied on September 23, 2010 (Pet. App. 51). On December 17, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to February 20, 2011, and the petition was filed on February 22, 2011 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Treaty of April 19, 1858, 11 Stat. 743, established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee simple. *Id.* at 335. In 1894, the Tribe ceded and sold approximately 168,000 acres of unallotted land to the United States. Act of Aug. 15, 1894, 28 Stat. 286, 314-319; see *Yankton Sioux Tribe*, 522 U.S. at 335-340.

In 1998, this Court held that the 1894 sale diminished the Reservation by severing the unallotted ceded lands from the Reservation, but declined to decide whether the Reservation had been disestablished completely. *Yankton Sioux Tribe*, 522 U.S. at 357-358. The Tribe, the State, the County, and the United States (among others) continued to litigate the current status of the Reservation in the lower courts. The court of appeals subsequently held in *Yankton Sioux Tribe* v. *Gaffey*, 188 F.3d 1010 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000), that the Reservation had not been disestablished. *Id.* at 1013. It also held, however, that the Reservation, already diminished by lands ceded to the United States, had been "further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 1030. This Court denied certiorari, see *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

The matter was remanded to the district court, which determined with greater specificity which lands remained part of the diminished Reservation. *Yankton Sioux Tribe* v. *Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007). The court of appeals largely affirmed the district court's determination. *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 985, 988 (8th Cir. 2010). The State and other parties have filed petitions for a writ of certiorari in that case, challenging the court of appeals' conclusion that the Reservation has not been disestablished. See *Daugaard* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-929 (filed Jan. 18, 2011); *Southern Missouri Recycling & Waste Mgmt. Dist.* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-931 (filed Jan. 18, 2011); *Hein* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-932 (filed Jan. 18, 2011). The Tribe has filed a conditional cross-petition, challenging the court of appeals' conclusion that the Reservation no longer includes allotted lands that have passed into non-Indian ownership. See *Yankton Sioux Tribe* v. *Daugaard*, conditional cross-petition for cert. pending, No. 10-1058 (filed Feb. 22, 2011). Simultaneously with the filing of this brief, the United States is filing a brief opposing those petitions and conditional cross-petition.

2. a. This case arises out of litigation related to the above-described reservation-land dispute, pending at the same time in the same lower courts. The case has its genesis in the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, which authorized the Army Corps of Engineers (Corps) to construct dams along the Missouri River. Pet. App. 4. Some of the land that the Corps acquired for that purpose—land currently identified as the North Point, White Swan, and Spillway Recreation Areas—was within the 1858 boundaries of the

Yankton Sioux Reservation. *Id.* at 6. Most of that was formerly allotted land that the Corps bought in fee. *Id.* at 6-7, 10 n.6. A small portion was allotted land that the United States was holding in trust for tribal members, which the Corps acquired through condemnation, compensating the affected tribal members for the taking. *Id.* at 8-10 & n.5.

Several decades later, Congress enacted the Water Resources Development Act of 1999 (WRDA), which required the Corps to "transfer * * * in perpetuity" certain lands to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses." Pub. L. No. 106-53, § 605(a)(1), 113 Stat. 391. One of the requirements for land to be transferred was that it be "located outside the external boundaries of a reservation of an Indian Tribe." *Id.* § 605(b)(3), 113 Stat. 391; see *id.* § 605(c)(2), 113 Stat. 391 (describing recreation areas transferred as "located outside the external boundaries of a reservation of an Indian Tribe"); *id.* § 607(a)(4), 113 Stat. 395 ("Nothing in this title diminishes or affects * * * any external boundary of an Indian reservation of an Indian Tribe."). A later amendment to the WRDA required the Corps to "lease * * * in perpetuity," rather than transfer in fee, particular areas. Water Resources Development Act of 2000, Pub. L. No. 106-541, § 540(d)(3), 114 Stat. 2666. Pursuant to the WRDA, the Corps transferred the North Point and White Swan Recreation Areas, and leased the Spillway Recreation Area, to the State. Pet. App. 24.

b. The Tribe sued the United States, the Corps, federal officers, the State, and state officers. Pet. App. 34. The complaint, as amended, alleged that the Corps had violated the WRDA by transferring title to the North

Point and White Swan Recreation Areas and by leasing the Spillway Recreation Area to the State. *Id.* at 24. According to the Tribe, those areas remain within the Yankton Sioux Reservation and are therefore not subject to the WRDA. *Ibid.*

The district court granted summary judgment for the defendants. Pet. App. 22-31. The court held that the outcome of the case was controlled by its 2007 decision in the reservation-land litigation described at p. 3, *supra*. Pet. App. 29; see *Podhrasky*, 529 F. Supp. 2d 1040. The court had in that decision enumerated certain categories of land that remained within the Reservation, and the recreational areas did not fall into any of those categories. Pet. App. 28-29.

c. The Tribe appealed, and the court of appeals held the appeal in abeyance pending its resolution of appeals of the district court's ruling in the other case. Pet. App. 2. After deciding those appeals (in which it largely affirmed the district court), the court affirmed the district court's decision in this case. *Id.* at 1. The court explained that, pursuant to its decision in the reservation-land appeals, the Reservation "does not include allotted land that passed out of Indian hands." *Id.* at 6. The lands at issue in this case, the court concluded, had passed out of Indian hands either before the Corps acquired them or at the time the Corps acquired them. *Id.* at 6-10 & n.6. Because the lands were therefore not part of an Indian reservation, their disposition had been lawful under the WRDA. *Id.* at 5.

DISCUSSION

The Tribe does not contend that this case merits review in its own right, but instead requests that it be held for the currently-pending petitions in the related litiga-

tion concerning the status of lands within the boundaries of the original Yankton Sioux Reservation. See *Daugaard* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-929 (filed Jan. 18, 2011); *Southern Missouri Recycling & Waste Mgmt. Dist.* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-931 (filed Jan. 18, 2011); *Hein* v. *Yankton Sioux Tribe*, petition for cert. pending, No. 10-932 (filed Jan. 18, 2011); *Yankton Sioux Tribe* v. *Daugaard*, conditional cross-petition for cert. pending, No. 10-1058 (filed Feb. 22, 2011). The government agrees that it would be appropriate to hold this petition pending the Court's disposition of the Tribe's conditional cross-petition in the reservation-land case, No. 10-1058.

The petition in this case challenges the decision below only to the extent that the decision relied on the court of appeals' holding in the other litigation. See Pet. 12-14. The Tribe correctly points out that the court of appeals' holding in the present case—that the lands at issue are "located outside the external boundaries of a reservation of an Indian Tribe," Pub. L. No. 106-53, § 605(b)(3), 113 Stat. 391, and thus the Corps could transfer or lease them to the State under the WRDA, see Pet. App. 5-10 & n.6—is largely derivative of the court's conclusions regarding the present-day boundaries of the Reservation.

The outcome of this case would not be affected by the disposition of the primary petitions in the reservation-land case (Nos. 10-929, 10-931, and 10-932), but could potentially be affected by the disposition of the Tribe's conditional cross-petition (No. 10-1058). The primary petitions all challenge the court of appeals' conclusion that the Reservation was not completely disestablished. Even if the Court were to grant those petitions and con-

clude that the Reservation was disestablished, that would have no effect on the court of appeals' conclusion in this case: it does not matter, for purposes of the WRDA, whether lands lie outside a reservation because the reservation boundaries do not include them (as the court of appeals held) or because there is no reservation at all (as would be the case if the Yankton Sioux Reservation was completely disestablished). Accordingly, the pendency of this case provides no reason why the primary petitions in the reservation-land case should be granted, and the Court should deny certiorari in this case even if it were to decide that those petitions warrant plenary review.

The Tribe's conditional cross-petition in the reservation-land case, however, challenges the court of appeals' determination that allotted lands that have passed into non-Indian hands are no longer part of the Reservation. That determination substantially informed the court of appeals' decision in this case. See Pet. App. 6. Were the Court to grant the primary petitions in the reservation-land case and also grant the conditional cross-petition—and then agree with the Tribe that the present-day Reservation includes allotted lands that have passed into non-Indian hands—a remand for further proceedings in this case would be appropriate. Otherwise, the petition in this case should be denied.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Yankton Sioux Tribe* v. *Daugaard*, No. 10-1058, then disposed of as appropriate.

Respectfully submitted.

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